

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 BELINDA KIRK,

12 Petitioner,

13 v. **ORDER DENYING IN PART AND
GRANTING IN PART PETITIONER'S
MOTION FOR RECONSIDERATION**

14 YOLANDA BALDOVINOS, et al.,

15 Respondents.

16 _____/ 17 Petitioner Belinda Kirk's Motion for Reconsideration of this Court's denial of her
18 application for a temporary restraining order is DENIED in part and GRANTED in part.19 **1. Procedural Background**20 On June 7, 2010, Petitioner filed (1) a petition for writ of habeas corpus; (2) a petition
21 to review a previous state court child custody determination pursuant to the Indian Child
22 Welfare Act ("ICWA"), *see* 25 U.S.C. § 1914; and (3) a notice of removal of an ongoing
23 State court child custody proceeding. Dkt. No. 1. In response to Petitioner's filings, this
24 Court issued an Order to Show Cause requiring Respondents to file a written answer to
25 Petitioner's ICWA petition and her notice of removal by July 25, 2010.¹26 On June 15, 2010, Petitioner filed a Motion to Proceed in Forma Pauperis, which the
27 Court granted. Six days later Petitioner filed a Motion to Appoint Counsel. Dkt. No. 11.
28 She then filed an Emergency Motion for Temporary Restraining Order. Dkt. No. 13. The

1 In its Order to Show Cause, the Court also denied Petitioner's request for habeas relief.

1 Court denied Petitioner's Emergency Motion at a hearing held on July 2, 2010.

2 Petitioner now asks the Court to reconsider three rulings it made at the July 2nd
3 hearing. First, Petitioner asks the Court to reevaluate its decision not to immediately appoint
4 counsel for Petitioner. Second, Petitioner requests that the Court reexamine its refusal to
5 issue an order forbidding the State Court from proceeding "in any way." Finally, Petitioner
6 asks the Court to reconsider its decision setting a hearing date on Petitioner's petition for July
7 30, 2010.

8 As explained below, the Court DENIES Plaintiff's first two requests, but GRANTS
9 her third request.

10 **2. Motion to Appoint Counsel**

11 At the hearing on Petitioner's Motion for a TRO, the Court explained that it was still
12 considering Petitioner's request for appointment of counsel. The Court noted that it was
13 awaiting Respondents' answer to its Order to Show Cause and would rule on Petitioner's
14 motion for appointment of counsel after it received that response.

15 In her Motion for Reconsideration, Petitioner argues that the court erred in failing to
16 grant her motion at or before the TRO hearing. According to Petitioner, 25 U.S.C. § 1912
17 provides her with a statutory right to the immediate appointment of counsel.

18 Petitioner misunderstands the law. Section 1912 provides the parent of an Indian
19 child with a statutory right to counsel "in any removal, placement, or termination
20 proceeding." 25 U.S.C. § 1912(b). Section 1903 makes clear that the "removal, placement,
21 or termination proceeding" to which § 1912(b) refers are proceedings involving "any action
22 removing an Indian child from its parent or Indian custodian for temporary placement in a
23 foster home" or "any action resulting in the termination of the parent-child relationship." 25
24 U.S.C. § 1903. In other words, § 1912 grants the parent of an Indian child a right to
25 appointed counsel in an ongoing child custody proceeding. It does *not* grant a parent the
26 right to counsel in an action seeking review by a federal court of a previous state court
27 custody determination, though the Indian Child Welfare Act contemplates such actions. *See*
28 25 U.S.C. § 1914 (providing a parent of an "Indian child" "from whose custody such child

1 *was removed*" with the right to "petition any court of competent jurisdiction to invalidate
2 such action" upon a showing that the action violated certain provisions of the ICWA)
3 (emphasis added).² The Court therefore finds that, although Petitioner has a statutory right to
4 counsel during ongoing child custody proceedings, she does not have a statutory right to
5 counsel in an action, brought pursuant to § 1914, which seeks review of a state court's
6 previous decision to remove a child from her care.

7 Petitioner has, of course, also filed a notice of removal of the ongoing state custody
8 proceedings to this Court. The Court has not yet determined, however, whether removal of
9 the state proceedings was proper and has asked Respondents to address the issue. *See Rains*
10 *v. Criterion Systems, Inc.*, 80 F.3d 339, 342 (9th Cir. 1996) (noting that, in any removal
11 action, a district court has an independent obligation to determine whether federal
12 jurisdiction exists). Because the Court has not yet decided whether it has jurisdiction over
13 the ongoing custody proceedings, Petitioner's right to counsel under § 1912 has not yet
14 attached. If the Court decides that removal of the proceedings was proper, then it will
15 appoint counsel immediately. Until that time, Petitioner lacks a statutory right to counsel.

16 In sum, Petitioner does not have an immediate right to counsel. As the Court noted at
17 the hearing on Petitioner's request for a TRO, the Court will decide whether to exercise its
18 authority under 28 U.S.C. § 1915(e)(1) to appoint counsel after it receives Respondents'
19 responses to its Order to Show Cause.

20 The Court is quite mindful of the challenges that Petitioner faces in proceeding pro se.
21 Petitioner should rest assured that the Court will carefully evaluate all issues raised by
22 Petitioner and Respondents and will take all steps necessary to ensure that Petitioner receives
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24 ² In the appointed counsel context, a parent's rights under the ICWA are similar to those
25 of a non-capital state criminal defendant. Though a non-capital defendant has a constitutional
26 right to counsel during state criminal proceedings, the defendant has neither a constitutional nor
27 a statutory right to counsel in a subsequent federal habeas proceeding in which the defendant
28 petitions a federal court to review the state court criminal proceeding. *See Tomita v. Runnels*,
185 Fed. Appx. 600, 601 (9th Cir. 2006) (unpublished) (noting that a defendant "does not have
the right to counsel for habeas corpus proceedings). Similarly, while an Indian parent has a right
to counsel in a state child custody proceeding, the parent does not have a statutory right to
counsel when petitioning a federal court to review that proceeding. *See Doe v. Mann*, 415 F.3d
1038, 1043 (9th Cir. 2005) (noting other similarities between the law governing habeas petitions
and that governing ICWA petitions).

1 a fair hearing on her claims.

2 **2. The Denial of Petitioner's Request for a TRO**

3 Petitioner next argues that the Court's finding that she would not suffer irreparable
4 injury if it denied her request for a TRO was "completely confusing" and "manifestly
5 unjust." Mtn. for Reconsideration at 3. The Court disagrees.

6 A party seeking a TRO must demonstrate (1) a likelihood of success on the merits; (2)
7 that it is likely to suffer irreparable harm if preliminary relief is not granted; (3) that the
8 balance of equities tips in favor of the moving party; and (4) that an injunction is in the
9 public's interest. *See Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365, 374 (2008).

10 In her application for a TRO, Petitioner asked this Court to issue an order prohibiting
11 the Alameda Superior Court "from proceeding or acting in any way regarding the minor or
12 the Petitioner unless and until [this Court] remands the case back to the State Court."
13 Application for Temporary Restraining Order at 14.

14 As the Court explained at the TRO hearing, Petitioner cannot establish that she will be
15 irreparably harmed if the Court does not grant the requested preliminary relief. Petitioner
16 properly filed a Notice of Removal of the ongoing child custody proceeding with the state
17 court. Under federal law, this notice "effect[s] the removal [of those proceedings] and the
18 State shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446.
19 Thus, the State court is precluded from taking any actions that alter the status quo regarding
20 Petitioner's parental rights or her son's custody status. Absent compelling evidence, and
21 Petitioner has presented none, the Court will not assume that the State court intends to violate
22 federal law by taking an action that alters or otherwise adversely affects Petitioner's parental
23 rights before the case is remanded. As a result, Petitioner has not demonstrated that she will
24 suffer irreparable harm if the Court does not issue an Order expressly precluding the State
25 Court from doing so.

26 The Court is aware that, at the hearing on Petitioner's Request for a TRO, the County
27 stated that it needed the State Court's approval of a procedural matter in order to continue to
28 receive funding for Petitioner's son's ongoing medical care. If, as the County maintains,
such approval is necessary to maintain the status quo, such an action by the State Court

1 would not violate § 1446's mandate that the State "proceed no further" until the case is
2 remanded.

3 In her Motion for Reconsideration, Petitioner argues that she will suffer irreparable
4 harm because she has been ordered by the State court to appear at a hearing related to the
5 procedural matter just described. The Court, however, fails to see how appearing in State
6 court will cause Petitioner irreparable harm. As noted, the State court cannot take any
7 actions that alter Petitioner's parental rights until the case is remanded. The mere fact that
8 Petitioner has been ordered to appear does not indicate to the Court that the State Court is
9 prepared to violate federal law absent an order from this Court.

10 In sum, Petitioner has not demonstrated that irreparable harm will result if the Court
11 does not issue an Order barring the State Court from proceeding any further.

12 **3. The Scheduled July 30, 2010 Hearing**

13 The Court has set July 30, 2010 as the hearing date for argument on Petitioner's
14 Petition to Invalidate the state court's previous custody determination and on the validity of
15 Petitioner's removal of the ongoing state custody proceedings. That date is five (5) days
16 after Respondents' answer to the Court's Order to Show Cause is due. After reviewing its
17 Order to Show Cause, however, the Court now realizes that it informed Petitioner that she
18 would have thirty (30) days to file a written response to Respondents' answer and that the
19 Court would not schedule a hearing until after it received Petitioner's traverse. Order to
20 Show Cause at 5.

21 In light of the conflict between the Court's statement in its Order to Show Cause and
22 its decision to schedule a hearing on Petitioner's petition for July 30, 2010, the Court
23 GRANTS Petitioner's request to reconsider its scheduling decision. The Court presents
24 Petitioner with the following choice: If Petitioner would like this matter to be heard on July
25 30, 2010, the Court will conduct the hearing as scheduled. If, on the other hand, Petitioner
26 would like additional time, up to 30 days after her receipt of Respondents' answer, to prepare
27 a written response, Petitioner should file a request to postpone the hearing with the Court.
28 The request should indicate how much time Petitioner would like to file a traverse (up to 30
days). The Court will then vacate the July 30, 2010 hearing and reschedule the hearing for

1 approximately one week after Petitioner's traverse is due.

2 **IT IS SO ORDERED.**

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5 Dated: July 13, 2010
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CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE